United States Court of Appeals

for the Second Circuit

REPLY BRIEF

No. 76-1282

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1282

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UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS C. OSTRER,

Defendant-Appellant.

On Appeal from the United States District Court

For the Southern District of New York

REPLY BRIEF OF THE DEFENDANT-APPELLANT

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In its brief, the Government has made several critical concessions, mis-cited a number of cases and principles of law, and set up a straw man with the intention of appearing to destroy the Appellant's major contention by knocking down the straw man. All of this requires some reply.

1. THE GOVERNMENT HAS CONCEDED A MAJOR PART OF APPELLANT'S CLAIM WITH RESPECT TO THE TRANSMISSION OF TAINTED INFORMATION TO THE BELMONT TRIAL PROSECUTOR, BUT IT HAS ELSEWHERE MIS-STATED THE FACTS SERIOUSLY.

The Government admits that the New York District Attorney transmitted to the Belmont trial prosecutor "the thrust of the conversation" [emphasis supplied] between Ostrer and his Attorney Julius November that was illegally recorded by the District Attorney's office. It is very

important that the Government concedes that it was the thrust of the Ostrer-November conversation, rather than any particular phrase or sentence or excerpt from that conversation, that was transmitted. It has been Appellant's contention all along that part of Appellant's difficulty in proving his claim of prejudice lies in the fact that he is unable to discover and hence unable to prove to the Court precisely what words were transmitted. This is due in no small measure to the conspicuous absence of notes and memoranda, and the equally conspicuous failure of memory by key people, with respect to the critical Fine-McGuire meeting of December 22, 1972. (See Appellant's brief at 42-47.)

It is anyone's guess what the communicated "thrust" of the Ostrer-November conversation consists of. It is the Appellant's contention that most likely, the "thrust" was that Ostrer and November had something on Moss, and that therefore it was evident that Moss had something in his background -- something that perhaps McGuire was unaware of -- that would have made Moss a poor, if not dangerous, Government witness. This "thrust" also carried with it the implicit (at the very least) advice by Fine that McGuire should be very cautious before putting Moss on the witness stand at Ostrer's trial. In this way, the attempted "obstruction of justice" could be prevented. It is only with this background that one can fully understand why

McGuire felt it necessary to tell Fine that he had "about decided" not to use Moss.(App. 27) Why would McGuire have told Fine this, unless Fine were concerned lest McGuire use a dangerous (to the Government) witness at the Belmont trial?

The Government thus concedes that the thrust of the conversation was transmitted, with all of the perhaps implicit advice and warning that accompanies the thrust. Yet Appellant is unable, through no fault of his own, to determine precisely what words were used to communicate the thrust.

In its factual discussion of the case, the Government grossly minimizes Appellant's claim as to the transmission of tainted information to the Belmont prosecutor. The Government seems to think that Appellant claims nothing more was transmitted other than that Aubrey Moss should not be called as a Government witness. (Government's Brief [hereinafter "GB"] at 4) In fact, Appellant's major claim is that even the information and "thrusts" admittedly communicated by the state to the Federal Government give rise to an enormous potential and possibility, if not probability, that Ostrer was in some important measure prejudiced because of the inevitable yet probably indeterminable degree to which McGuire's trial tactics and decisions were influenced by the information he got from

the District Attorney's office. Since it is impossible to reconstruct McGuire's total mental process at the time, it is impossible to learn, for example, how it might have affected McGuire when he learned that an investigator (Jim Lynch) previously (or currently, as he erroneously believed) associated with the FBI, was working for Ostrer, or the extent to which McGuire might have read some subtle clue from Fine to the effect that Ostrer probably would not testify.* Thus, when Fine responded in a most meagre way to McGuire's request for material for cross-examination of Ostrer, could McGuire have divined from Fine's inaction that there was not much of a chance that Ostrer would testify (something that Fine knew at the time), and that therefore McGuire did not have to waste much time preparing for that event? We will never know fully the answers to these questions, yet they raise a substantial probability that Ostrer was prejudiced in subtle ways that cannot be reconstructed at this point.

The Government even mis-reads Judge Brieant's findings with respect to what was communicated by Fine to McGuire. The Government would have this Court think that the Court Below found that Fine "informed the federal prosecutor only

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*The question of whether or not Ostrer would testify in his own behalf at the Belmont trial was discussed on numerous occasions and in some detail on the tapes, all of which were available to Fine. (App. 680)

that they had information that Moss might be tampered with." (GB at 5) In fact, Judge Brieant found that "Fine told McGuire, in substance, that Ostrer had certain information regarding Moss, and expressed his fear that this information would be used to effect an obstruction of justice." (App. 693-694) There is a critical difference between the Government's version of what the Court Below found was transmitted to McGuire, and Judge Brieant's actual finding. The Government tries to make it appear that all Fine communicated was that Moss might be "tampered with". The Judge's finding, however, indicates that Fine communicated quite clearly, by a combination of word and implication, that (1) there was information available that would make Moss look bad, (2) the information was to be used somehow to "obstruct justice" (i.e., to prevent Moss from giving testimony helpful to the prosecution), and (3) Ostrer was in possession of the derogatory information. From the Government's version, one would never have guessed that Fine managed to tell McGuire that the "obstruction of justice" was to be accomplished because of Ostrer's knowledge of Moss' skeletons. By communicating what Judge Brieant actually found he communicated, Fine was able, albeit obliquely, to advise McGuire, or at least to give McGuire a strong additional reason, not to use Moss as a Government witness.

Similarly, the Government states that Judge Brieant found that the transmitted information "had no effect

whatsoever on the federal trial" [emphasis supplied], and that by the time he received the tainted information, McGuire absolutely "had decided not to call [Moss] to the stand." (GB at 5-6, 35) In fact, Judge Brieant's findings were far more equivocal. He found that at the time of the communication "it was not McGuire's present intention to call Moss as a witness, at least, not as part of the Government's direct case." (App. 694) Judge Brieant never stated in his findings that the knowledge obtained from Fine played no role whatsoever in McGuire's ultimate failure to call Moss to the stand. What Judge Brieant did find was that McGuire on December 22, 1972, had made a tentative trial strategy decision not to call Moss as a witness in the Government's direct case because Moss was not being truthful, and that McGuire reserved the right to reconsider his trial strategy and hence his tentative decision not to call Moss in his direct case. Since nothing happened at trial sufficient to change McGuire's tentative decision, he stuck with that decision. (App. 694, 709-710) What Judge Brieant did not and could not discern, of course, was the degree to which Fine's information put McGuire into a frame of mind such that a trial development serious enough to call for Moss to be a Government witness would have had to be a very significant and very serious trial development, for in the absence of such a significant development, McGuire could be counted

on not to risk putting a flawed witness on the stand -- and a great deal of Moss' flaw was learned by McGuire from Fine. Fine's information was thus constantly weighing in McGuire's mind and influencing his decision.

The Government also minimizes the reasons why Ostrer and November considered Susan Gold's information to be so important and so potentially useful at trial. The Government would have this Court think that Gold's information, as embodied in the statement she signed,* concerned nothing except Moss' sex life. (GB at 8) In fact, the statement revealed, inter alia, that Moss had a grudge against Ostrer because of a money obligation (Ex. 167), that he had threatened to "get" Ostrer (Ex. 168), that he was suddenly talking ill of Ostrer (Ex. 168) despite the fact that these ill-words were a recent product of the past eight months or so (Ex. 167), and that Moss had tried to get money from Ostrer but had failed (Ex. 174). It is clear that November was not proceeding on a simple-minded and legally questionable theory that the value of Gold's information was merely to impugn Moss' reputation for chastity before the jury.

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*Gold also had information and potential testimony to discredit Moss that was not embodied in the written statement, but which was reflected clearly in the bugged conversations. See Appellant's brief at 9-11. The Government also tries to give the erroneous impression that Gold was paid to do her affidavit (GB at 9), a claim not based in the findings of the Court Below, and obviously not accurate, for the statement was signed by Gold despite Ostrer's refusal to give her a raise or a bonus.

The Government recognizes that at some point in the Belmont pre-trial proceedings and preparation, McGuire considered Moss to be an important witness,* for it concedes that part of the reason McGuire kept Moss under subpoena was to keep the defense believing that Moss, rather than Hellerman, was the Government's "primary witness" against Ostrer. (GB at 13) Obviously, if Moss were really not a useful prosecution witness at all, McGuire could not expect to fool the defense into thinking that the Government's case was built around Moss.

Furthermore, the Government apparently concedes that McGuire's decision to keep Moss under subpoena was motivated at least in part by Fine's request that he do so. (GB at 13) This move by the Government, which was meant to fool the defense, was obviously successful, for Ostrer regarded Moss as a witness likely to be called by the

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*This concession is made despite a statment elsewhere in the Government's brief that McGuire decided before meeting Fine that Moss would not be a helpful Government witness. (GB at 37-38) The Government cites as support for this conclusion that even Ostrer's trial counsel agreed that Moss would make a poor Government witness. (GB at 38, fn.) Yet it was precisely because Edelbaum felt Moss would make a poor Government witness, and <u>because he felt that the Government did not know all the reasons Moss would make such a poor witness</u>, that he was excited about the possibility of cross-examining Moss. This is obvious from the portion of the sentence which the Government omitted from its quotation (GB at 38, fn.). The full quotation ends with "...I would have a little party [cross-examining Moss] if he took the witness stand." (App. 478)

Government.* Thus, Ostrer was indirectly prejudiced by Fine's transmission, for his trial strategy was in part based on a false assumption instigated by Fine.

In addition, the Government seems to concede that McGuire had an SEC investigator contact Moss after the December 22, 1972 meeting with Fine, in order to "be certain that Moss realized he was under subpoena for the trial." (GB at 13) Since Moss had been subpoenaed prior to the December 22nd meeting (GB at 13, fn. 3), why was it necessary for McGuire to <u>again</u> contact Moss? Obviously, McGuire had more reason to remind Moss that he was on call, other than the Hellerman cover or to protect Fine's secret surveillance, for these ends would have been accomplished just as easily by merely leaving undisturbed the already-existing subpoena. It is quite probable that McGuire wanted to keep his trial strategy flexible, and Moss was being held in reserve, as Judge Brieant found, in case something happened at trial to make his testimony necessary. Thus, McGuire quite simply and admittedly had not by this time closed the door on the possibility of using Moss as a witness, and Fine's information thus had to have played <u>some</u> role in McGuire's ultimate, final

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*Susan Gold's statement indicates that Ostrer viewed Moss as a prosecution witness. (Ex. 167) Ostrer himself described Moss as a potential Government witness. This was the reason for the plan to use Susan Gold to impeach Moss.

decision not to use Moss.

The Government also seriously misconceives the Appellant's argument concerning the importance of evidence of the fifty-fifty contracts that Ostrer had with various investors. Appellant does not argue, as the Government claims he does, that proof of the fifty-fifty contracts would have convinced the jury that Ostrer had "no share in the profits of the illegal scheme". (GB at 19) This obviously would not have been true, since Ostrer would still have profited from those shares that he did not sell to his investors/friends. Rather, Appellant argues that the more of Ostrer's shares that were proven to have been re-distributed by him to friends who were getting half the profits, the less would Ostrer's potential profit have been, if Hellerman were testifying truthfully that he (Hellerman) was to get half of the profits from all of the shares assigned to Ostrer (and, of course, to Ostrer's investors/friends). Credibility in this context is necessarily a question of gradation. The crucial question is how many of Ostrer's shares' profits would have had to go to these other investors/friends before a jury would decide that there was not enough profit left in it to make Ostrer enter into a conspiracy and partnership with Hellerman. Clearly, the fewer shares Ostrer was to profit from, the less credible Hellerman's testi-

mony would have been that he (Hellerman) and Ostrer were partners.*

Along these same lines, the Government argues that it is irrelevant that Hellerman gave some testimony that one "Kaufman" might also have had a fifty-fifty contract with Ostrer (GB at 39-40), since Ostrer has not claimed that he had any such deal with Kaufman. Of course, the crucial issue is not what Ostrer would have or has claimed about the fifty-fifty deals, since Ostrer did not testify at the Belmont trial. The crucial question is what Moss would have said on the stand about who had what kind of deal with Ostrer. Moss, after all, knew of the details of Ostrer's financial arrangements with these investors/friends, since he (Moss) was himself one of them. The Government makes the assumption that Moss would not have been able to testify about any such Ostrer-Kaufman contract (GB at 40), but, as the Government itself admits, the current record is barren of evidence as to precisely what Moss knew. Judge Brieant at no time makes any assumption that Moss would not have had personal knowledge of all of the fifty-fifty contracts."** He simply found that such

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*Assuming that the Government was claiming that Ostrer had a price, it was up to the jury to determine if Hellerman offered Ostrer enough to buy his knowing participation in a conspiracy.

**The Court Below seemed to assume, in fact, that Moss had knowledge of contracts other than his own. (App. 712)

testimony would have been equally supportive of the Government's theory.* (App. 711-712, 715)

Thus, the Government makes the mistake of assuming or predicting how the Belmont jury would or might have reacted to testimony that would have been before it had McGuire put Moss on the stand. But it is the worst form of "Monday morning quarterbacking" to make such assumptions, for it would have been up to the jury to give such weight to the evidence as it saw fit. Certainly Ostrer makes a substantial argument when he says that the jury could well have weighed evidence of such contracts heavily in his favor when judging the credibility of Hellerman.

The Government treats too lightly Ostrer's claim of Fourth Amendment taint, saying that the Appellant has either waived that claim, or does not dispute or appeal Judge Brieant's determination of absence of such taint. (GB at 6, fn.) In fact, Ostrer has consistently maintained that both his Fourth and Sixth Amendment rights were violated.

The Government claims that the Ostrer wiretaps were

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*Judge Brieant's conclusion, of course, that Moss' testimony regarding the agreements would have been consistent with the Government's theory and might be seen by the jury as bolstering, rather than attacking, Hellerman's credibility, is a conclusion of law and not a finding of fact. At best, it is a speculation as to how the jury might have evaluated a particular piece of evidence which was certainly susceptible as well to Ostrer's interpretation.

declared invalid because prior wiretap orders upon which the Ostrer wiretap was based were issued without probable cause. (GB at 14) This is somewhat misleading, and it touches an area which was not gotten into Below, since the Government conceded for purposes of this taint hearing that the Ostrer wiretap was illegal. The Court Below never got into the reasons why the wiretap was illegal. In fact, the major reason that the Supreme Court of New York found the predecessor wiretaps illegal was because nothing obtained from those wiretaps constituted evidence of illegality; yet the wiretaps were renewed time and time again, and each subsequent wiretap application was built upon the non-criminal information obtained from the prior wiretap. It is ironic that the Government now is trying to squeeze evidence of criminality out of the Ostrer wiretaps, just as the New York prosecutor tried to squeeze criminality out of the predecessor wiretaps.

The Government appears to rest its argument in large part upon the alleged good faith of McGuire, and even of Fine. The Government argues that if a good faith state-to-federal contamination such as allegedly occurred here were sufficient to taint a federal conviction, then the Federal Government could never protect itself against such "contamination of its prosecutions by persons over whom it has no control." (GB at 33) The flaw in this argument is, of

course, that the Government, while it had no control over Fine, certainly had control over McGuire.

McGuire should have known or suspected enough to have insisted on knowing the source of Fine's information first. If Fine still refused to disclose it, McGuire should have refused to listen to the transmission. The Government claims that there was no reason for McGuire "to infer that the source of the information was electronic surveillance" or that the information came from an attorney-client conversation. (GB at 35)* The Court Below (App. 707) and the Government (GB at 35) claim that frequently the source of such information is a confidential informant. Certainly, then, McGuire could have asked simply if the source were an informant, without asking the name of the informant. An affirmative answer would have assured McGuire that the source was not unlawful surveillance. Surely McGuire, if he suspected there was an informant, would have asked Fine if he could use the informant to bolster his case in the Belmont trial. Yet McGuire failed to ask these simple, common-sense questions, which surely he had an obligation and an incentive to ask under the circumstances.

More critically perhaps, the Government treats very

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*McGuire knew all along that November was an attorney, according to Judge Brieant's findings (App. 729, n. 12), although he did not learn until April 18, 1973, that November was the source of Fine's information about Moss. (App. 697; 729, n. 12)

lightly -- in only two pages -- Ostrer's very important argument that the absence of critical notes and memoranda, plus faded memories of Government personnel, plus McGuire's failure to earlier inform defense counsel of what he learned from Fine on April 18, 1973,* combined to deprive Ostrer of a chance to prove more specific prejudice. All the Government argues is that Ostrer had an opportunity at the hearing to prove what he could! Yet in a pregnant sentence, the Government concedes that under some circumstances "an adverse inference [from destroyed or missing evidence] such as is suggested by Ostrer may sometimes be used to bolster a weak showing [of taint]". (GB at 42) The Government's sole argument is that the circumstances of the Ostrer case are not such so as to allow such an inference to be drawn. There is no discussion of why this is claimed to be so. The Government claims that Ostrer has been unable to prove any prejudice, even a weak showing, and so any adverse inference drawn from the absence of notes and memoranda on the part of Government witnesses is not helpful for there is nothing to bolster. Surely, however, if this case is anything, it is <u>not</u> an open-and-shut case involving no doubt and no possible taint. Judge Brieant, even while

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*On this occasion, McGuire learned from Fine that Fine's information came from wiretaps of Ostrer's office, and that some of the wiretaps involved Julius November, whom McGuire knew to have been an attorney.

denying the motion, found Ostrer's claim to be "colorable" and in a "sensitive area affecting the fundamental constitutional rights of persons charged with crimes." (App. 717) If the Government concedes that in some cases an adverse inference may be drawn from missing evidence, then surely this is such a case.

2. THE APPELLANT, CONTRARY TO THE GOVERNMENT'S CLAIMS IN ITS BRIEF, IS NOT ARGUING FOR A PER SE RULE OF AUTOMATIC REVERSAL IN ALL CASES INVOLVING SIXTH AMENDMENT VIOLATIONS.

The Government devotes fifteen of its twenty-four pages of argument to erecting a strawman and then beating it down. Its entire first point (pages 21-36) is an argument against the adoption of "The Per Se Rule" of "deterrence" based on the need to impose sanctions "against the Government as punishment regardless of the defendant's guilt" and regardless of whether he suffered any prejudice. (Government's brief at pp. 21, 24, 35, quoting from United States v. Gartner, 518 F.2d 633 (2nd Cir. 1975).) Yet nowhere in Appellant's brief is there any request for application of a "per se rule" to punish the Government without regard to whether the defendant was prejudiced. Indeed, Appellant expressly argued that reversal is not the appropriate remedy in the vast majority of cases -- such as United States v. Mosca, 475 F.2d 1052 (2nd Cir. 1973) and United States v. Gartner, supra -- where there is no realistic possibility that the interception and communication of legal strategy could have prejudiced the defendant at his trial. The approach sought by the Appellant -- an approach adopted by most courts -- is designed precisely to assure that defendant is not in fact prejudiced by the overhearing and communication even if done in entire good faith. Lest there be any doubt whatever as to what Appellant is seeking -- and in light of the Government's total distortion of his

position -- it is necessary to reiterate that Appellant is requesting this Court to apply the rule -- applied by most courts -- requiring reversal in those situations "where there was unlawful interception and subsequent communication" to the trial prosecutor of legal strategy "under circumstances where there was ample opportunity for prejudice to have occurred, but where the possibilities of demonstrating actual prejudice are slight, because of the Government's failure to keep adequate records." (Appellant's brief at 25-30)

In articulating the "underlying rationale" for this rule, the courts have not focused on deterrence or punishment. They have -- as Appellant did in his brief -- justified the need for such a rule precisely by reference to the danger that the defendant may well have been prejudiced by the interception and transmission of his legal strategy. Because of the Government's total distortion of Appellant's discussion of the rationale for the rule followed by the courts. Appellant's argument is set out in the margin.*

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* "The underlying rationale of the rule requiring no actual showing of prejudice where the opportunity of prejudice exists is that there will often be cases where prejudice may well have occurred, but where it will be "difficult" to demonstrate such prejudice. Accordingly, the defendant is "relieve[d]" of the "practically impossible burden of proving that the unconstitutional conduct worked actual harm to him." It makes good sense to apply that rule to all situations where the external or uncontested facts establish that there was an opportunity for prejudice to have occurred (in the words of Glasser v. United States, supra: where prejudice could "conceivably" have occurred).

[continued on page -19-]

This is precisely the approach adopted by the Fifth Circuit in United States v. Brown, 484 F.2d 418 (5th Cir. 1973), cert den. 415 U.S. 960 (1960) -- the case principally relied on by the Government here. In Brown, the Court rejected a "per se" rule that would have required automatic reversal regardless of the "relevancy" of the material overheard or whether it was communicated to the trial prosecutor. Instead, the court proceeded "to consider... whether the overhear could have in any fashion tainted the conviction." In that case "defendant [did] not seriously contend [that the overheard] conversation [which dealt primarily with upcoming rallies] in any way tainted defendant's conviction." 484 F.2d 424-5. Lest there be any doubt about the Fifth Circuit's unquestioned adoption of the rule urged herein by Appellant, requiring reversal

* [continued from page -18-] If the courts were to demand a showing of actual prejudice under these circumstances, they would necessarily be affirming a certain -- though underterminable -- number of convictions where prejudice actually occurred but where it could not be proved. Thus, the courts have reasonably decided that the policies of the Constitution require them to err on the side of requiring a new trial in some cases where prejudice may not have occurred, rather than err on the side of affirming some convictions in cases where prejudice may well have occurred.

"The rationale of this 'salutary, prophylactic rule' would, of course, not be served were it applied to situations where the external or uncontested facts provide no conceivable opportunity for prejudice. Since this category contains no cases where actual prejudice might have occurred, a rule requiring automatic reversal would simply have the effect of requiring new trials in a large number of cases where no possibility of actual prejudice existed." Appellant's brief at pp 28-29 (footnotes omitted) (emphasis added)

where there was any real opportunity for prejudice, see United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970) and Grodsky v. United States, 376 F.2d 993 (5th Cir. 1967), described in Appellant's brief at 24-25.

Nor is the Government responsive to Appellant's argument when the Government repeatedly emphasizes, in its view, that the Government officials acted in good faith in intercepting and transmitting "the thrust" of the intercepted lawyer-client and legal strategy conversations. While Appellant vigorously disputes the alleged good faith of the Government officials in this case,* their good or bad faith is not central to Appellant's claim. Appellant claims -- and no amount of Governmental ignoring of this claim can obfuscate it -- that he was prejudiced in fact by the interception and communication of his defense strategy to the Federal prosecutor in charge of the Belmont prosecution. Appellant also claims that directly as the result of the Government's failure to keep and preserve records -- whether motivated by good or bad faith -- it has been difficult for him to demonstrate the full range and impact of that prejudice, despite the fact that it did occur.

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* It simply defies reality to believe that the policemen intercepting the conversations at issue here did not suspect that they were legal strategy discussions. It also defies reality to believe that the Federal prosecutor did not suspect that he was receiving information from an electronic monitoring source.

The Government's emphasis on good versus bad faith was squarely rejected by the Supreme Court in its recent decision in United States v. Agurs, ___U.S.___, 96 S.Ct. 2352 (1976), where the Court stressed in the context of the Government's Brady obligation, that the Government's "constitutional obligation is [not] measured by the moral culpability, or the wilfullness, of the prosecutor." The obligation exists "irrespective of the good faith or bad faith of the prosecution" (quoting Brady). "If the suppression of evidence results in constitutional error," the Court said, "it is because of the character of the evidence, not the character of the prosecutor." 96 S.Ct. at 2400. Here, too, it is the character of intercepted and communicated material -- legal strategy discussions about critical aspects of this very case -- that requires reversal even if the prosecutors acted entirely in good faith in intercepting, communicating, and receiving the material.

The Government places heavy reliance on excerpts from the unreported Sixth Circuit case of United States v. Valencia, 20 Cr.L.Rptr. at 2013. A fair reading of the excerpts printed in the Criminal Law Reporter demonstrates that Valencia supports Appellant's contention in several important ways: (1) the conversations at issue there were between an alleged drug smuggler and a lawyer who participated in the smuggling con-

cerning trial defense; the court held unequivocably that the conversations were covered by the Sixth Amendment. (2) The Court rejected the Government's argument -- made here as well -- that only interceptions occurring during the trial are covered by the Sixth Amendment. (3) In remanding for a hearing on taint the court held that "the Government will be obligated to disclose to Appellants any records it has with respect to" the communication. It seems likely, from a reading of the excerpts, that if the Government there -- as here -- discloses that they had notes but that these notes have unexplainably disappeared, that the Government will not be able to satisfy its burden of pursuading the court "certainly" that all the evidence in the case was "untainted."

In any event, the Valencia decision certainly appears consistent with the possibility of prejudice tests applied by other courts and advocated by Appellant herein.

The Government seeks to distinguish the instant case from Black and O'Brien by asserting -- with no record support -- that the surveillances in the latter cases were conducted "during a federal trial." That is simply a misstatement of fact. The overhearing in Black did not occur during the trial; it occurred "during the period the offense was being investigated some two months before and continuing about one month after the evidence in this

case had been presented to the grand jury." Black v. United States, 385 U.S. 26, 27 (1966). In O'Brien, as well, the surveillance apparently took place before the Federal trial. See Solicitor General's brief at page 11. The Government not only has misinformed this Court about the relevant chronology of these leading cases; it has also misstated the relevant chronology of the instant case. Here the surveillance did indeed continue throughout the entire Federal trial. Accordingly, if the fact that the surveillance was conducted "during a federal trial" is crucial -- as the Government suggests it is -- then the case for reversal here is even more compelling than it was in Black and O'Brien.*

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*The Government also asserts -- without citation -- that Appellant "mistakenly draws from the Black dissent the suggestion that none of the information overheard in that case was used by the prosecution." That again is simply a misrepresentation. Solicitor General, now Mr. Justice Marshall made precisely that representation to the Supreme Court: "The Solicitor General further stated that in consequence of an investigation, instituted by him following his discovery of this occurrence, he was able to represent to the Court that none of the information so procured had been utilized in Black's aforesaid prosecution." 385 U.S. at 30 (Harlan, J. dissenting)

3. THE NOVEMBER 21 OSTRER-NOVEMBER CONVERSATION WAS A PRIVILEGED ATTORNEY-CLIENT DISCUSSION OF DEFENSE STRATEGY.

The Government argues that the Defendant's entire Sixth Amendment claim must fail because it is grounded in a faulty "premise" -- the privileged nature of the Ostrer-November conversation on November 21, 1972. The Government contends that this Court must find -- as a matter of law -- that the conversation was not privileged. This invitation should be rejected. The legal conclusion which the Government claims is "mandate[d]" by the District Court's findings of fact is not even the most reasonable reading of that particular conversation. In fact, the Defendant invites this Court to go beyond merely reading the transcript and, instead, to listen to the actual tape recording itself. The content, tone, and inflections of that discussion clearly reflect an entirely legitimate (and appropriately boisterous) legal strategy discussion.

The District Court found that Ostrer "reasonably believed that November was extending legal counsel," (App. 682) and that for purposes of the motion for a new trial, "November was acting as an attorney for Ostrer (Id.). Thus, the issue is not merely one of the proper boundaries of a testimonial privilege; instead, "[w]e are concerned with safeguarding a criminal defendant's constitutional rights to a fair trial and to the effective assistance of counsel". (Id.)

The Government's brief fails to recognize the purpose for which the attorney-client privilege exists. As a result, it presents a remarkably backward legal analysis; it argues that because the text of the November 21 conversation could be read as one presenting "prima facie evidence that [the charge of future intended illegality] has some foundation in fact," citing Justice Cardoza's dictum in Clark V. United States, 289 U.S. 1, 15 (1933), the privilege is "drive[n] away", and because the privilege thus has been "drive[n] away", Ostrer has presented no Sixth Amendment claim at all.

This is not the law. And, most certainly, this cannot be a fair legal or factual conclusion drawn from the particular conversation in this case. The defendant insists that the conversation was an entirely proper -- and privileged -- attorney-client discussion of defense strategy. The Government conveniently fails to note that what makes "coercion" criminal is the actor's intent to induce the "victim" either (1) to "engage in conduct which the latter has a legal right to abstain from engaging in" or (2) "abstain from engaging in conduct in which he has a legal right to engage." (New York Penal Law §135.50) The truth of Susan Gold's statements has never been at issue. Section 135.75 of the Penal Code provides that

> In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

In other words, November's and Ostrer's discussions concerning plans to cross-examine -- or even to let Moss know that they had certain material available for use in his cross-examination -- were entirely legitimate. Pressure is not illegal intimidation unless it is used for illegitimate purposes; and pressure on a witness or potential witness to tell the truth -- and, thus, avoid being exposed as a liar -- is no violation of state or federal law.

The Government argues that because others besides Ostrer and November were present at the November 21 conversation, the privilege does not attach to these strategy discussions.* This might be the case if the "outsiders" present had been true third-parties -- i.e., persons in a neutral or adverse position vis-a-vis the subject of the communication. Here, such was not the case. November was in an attorney-client relationship with both William Kilroy and Seymour Greenfield -- both of whom were named targets of the very same state investigation was was Ostrer (See the Affidavit of District Attorney Frank S. Hogan at Ex. 26-27). In such a situation -- "where there is con-

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*It is quite clear from the eavesdropping "bug" that persons entered and left during the course of the Ostrer-November discussion. There is no affirmative evidence on the record that a "third-party" was present during the entire course of the strategy discussion. Further, it is clear that the most critical portion of the Ostrer-November conversation (Ex. 97-99) takes place between just those two. Again, the Appellant urges this Court to listen to the tape of the electronic surveillance.

sultation among several clients and their jointly retained counsel, allied in common legal cause" -- the privilege, of course, stands. See, e.g., In the Matter of a Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975).

Further, the Sixth Amendment -- as a Constitutional principle -- stands for more than merely the existence of a strict attorney-client evidentiary privilege. It protects a broad range of defense preparations, including a defendant's "right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation." In Re Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966), cited in United States v. Nobles, 422 U.S. 225, 238 at n. 12 (1975).* The District Court found that the electronic surveillance picked up conversations among Ostrer, November, and several of Ostrer's associates:

> Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks. Also mentioned was the name of Ostrer's private

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*See also United States v. Seale, 461 F.2d 345, 364 (7th Cir. 1972); United States v. Cooper, 297 F.Supp. 277 (D.Neb. 1975); United States v. Lebron, 222 F.2d 531 (2d Cir. 1955).

> investigator, one James Lynch, formerly of the Federal Bureau of Investigation. None of the conversations were with Maurice Edelbaum, Esq., then Ostrer's counsel of record in the federal case, but at times the conversations included discussion by others with Ostrer of Mr. Edelbaum's comments and advice.*

Discussion of such defense planning matters is protected by the Sixth Amendment.

The Government makes the preposterous argument that the lawyer-client privilege is breached whenever there is 'prima facie evidence that [the alleged charge] has some foundation in fact.'** This quotation -- lifted out of context from a case involving misconduct by a juror -- is entirely misleading and does not correctly state the law as to lawyer-client privilege. If this were the law, it would lead to the following absurd result: Assume that the Government claims that a certain conversation between a lawyer and his client was not privileged because it involved future crimes; assume that the Government, in seeking to have the lawyer disclose the conversation, introduces a witness who testifies that he overheard the

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*Judge Brieant found that "[t]hese conversations cannot properly be characterized as defense strategy discussions" -- seemingly because such topics were "treated conversationally," (App. 681) usually with no attorney present. Why the "conversational" tome of the discussions -- or, for that matter, the fact that the discussions sometimes were "shouting bouts" -- should necessarily preclude them from being defense strategy sessions is nowhere explained by the District Court.

**Clark v. United States, 289 U.S. 1, 53 S.Ct. 465 (1933).

conversation and its criminal plans. That surely is "prima facie evidence" that the Government's claim "has some foundation in fact." Assume further that the lawyer then introduces in defense airtight evidence that the alleged overhearer was in prison on a perjury conviction at the time he claims he overheard the conversation, and that the judge clearly believes the lawyer and disbelieves the Government witness. Under the Government's formulation, the judge would be permitted -- indeed required -- to compel the lawyer to disclose the communication even though he has concluded that it is privileged in fact and in law. The Government did, after all, present prima facie evidence and "some foundation in fact" for its claim that it was not privileged. This absurd result has never -- to Appellant's knowledge -- been suggested. Indeed, the very case relied on by the Government makes it clear that the proper test requires that the alleged abuse of the privilege must be "shown to the satisfaction of the judge." Here the judge was not satisfied that the privilege was breached. Clark v. United States, 289 U.S. 16, 53 S.Ct. at 470.

Surely the mere facts that (1) State Supreme Court Justice Grumet signed an order amending the prior surveillance warrant to authorize the interception of the November 21 Ostrer-November conversation and that (2) Judge Brennant found that state law enforcement authorities "believed in

good faith" that a criminal plan "appeared" to be afoot do not mean that the conversation actually was criminal or even that a prima facie case was made that it was criminal.

Conclusion

For these reasons, and for the reasons stated in Appellant's main brief, the judgment of the District Court denying Appellant's motion for a new trial should be reversed.

Respectfully submitted,

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October 22, 1976

Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Louis C. Ostrer, Docket No. 76-1282

Dear Sir:

Enclosed herewith please find for immediate filing ten (10) grey-bound copies of "Reply Brief of the Defendant-Appellant".

I hereby certify that on this day Ihave had two (2) copies of this reply brief delivered by courier/messenger to Robert B. Fiske, Jr., Esq., United States Attorney, One St. Andrew's Plaza, New York, New York 10007, to the attention of Gregory L. Diskant, Esq., and Lawrence B. Pedowitz, Esq., Assistant U. S. Attorneys.

I apologize for not having had time to have these reply briefs printed, as the initial brief was printed, but because we did not receive the Government's page proofs until one week ago today, and did not receive the Government's final printed brief until Tuesday of this week, we simply did not have time to print. Hence, we have filed photocopied briefs.

Very truly yours,

Harvey A. Silverglate

Harvey A. Silverglate

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Encls
DELIVERY BY COURIER/MESSENGER ON 10/22/76
cc: Gregory L. Diskant, Esq., and Lawrence B. Pedowitz, Esq.,
Assistant United States Attorneys